Covert Recordings of Disciplinary Meetings with an Employer - by Ian Mann

In the recent case of Chairman and Governors of Amweil View School v Mrs C Dogherty UKEAT/0243/06/DA, Mrs. Dogherty who was a teaching assistant at the Amweil View School, covertly recorded her disciplinary hearings and even the private deliberations of her employers who were considering her future employment. This article examines the state of the law on the use of covert recordings as evidence in the employment tribunal of an employer's conduct.

Use of covert recordings

Dogherty was dismissed for misconduct through the use of unreasonable force and inappropriate language in relation to some children. She relied upon her covert recordings to support her claim for unfair dismissal in the employment tribunal because she disputed the minutes of the open hearing of the disciplinary and appeal hearings produced by the school. She applied rather late in the day to have the evidence of her covert recordings admitted. The employment tribunal, by a case management order, allowed her to use the unauthorized recordings she had made of the disciplinary and appeal panel hearings, including the private deliberations. In other words, even though the employer did not know that the meeting nor the private deliberations were being recorded, that evidence could be used in the tribunal.

Appeal to the Employment Appeal Tribunal

The school appealed against the Order. It argued that Dogherty's clandestine recording of the deliberations of members of disciplinary and appeal panels amounted to an unjustified infringement of the governors' right to privacy, and that the public interest required those deliberations to remain private. Dogherty invoked her right to rely on the disputed evidence and to a fair hearing under Article 6 of the European Convention on Human Rights.

Applying XXX v YYY [2004] IRLR 471 the Employment Appeal Tribunal (EAT) held that "the first and most important rule of the law of evidence...is that evidence is only admissible if it indeed is relevant to an issue between the parties." It had no hesitation in upholding the tribunal's finding that the material contained in the recordings was relevant to Dogherty's unfair dismissal claim.

A majority of the EAT was satisfied that the decision taken by the ET was within the range of responses that a reasonable tribunal might make and refused to interfere in the absence of any questions of law-Barracks v Coles (Secretary of State for the Home Department intervening) [2006] EWCA Civ 1041 applied. Further, it was held, according to the overriding objective in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (SI 2004/1861) the tribunal could do justice by admitting the evidence, giving the school a full opportunity to consider it, and by penalising Dogherty in costs for disclosing the evidence late.

The school argued that to admit the disputed evidence would involve the ET itself infringing the human rights of the governors who were members of the relevant panels. However, the EAT rejected that what had occurred could possibly amount to the interference of the governors' right to respect for family life because the relationship between a governor and a member of their family was not "touched at all" by admission of the evidence in question.

The school submitted that there would be an interference with the governors' private lives because their privacy would be invaded if their observations, during the private deliberations or the open hearings which were conducted in the absence of the public, reached the public domain. However, the EAT held that each of the panel members had put themselves forward to carry out an aspect of the important voluntary work undertaken by many individual members of the public in the governance of schools. As such, the privacy element of the right to respect for private life of such a school governor was not engaged. In any event, the EAT relied on Jones v University of Warwick [2003] EWCA Civ 151, which held that a court may properly admit relevant evidence even where it has been gathered in breach of an Art 8 right to privacy where to do so was considered necessary to secure a fair hearing.

The school argued that the recordings were made clandestinely. However, the EAT noted that there was no breach of the contract of employment. Concerning the open hearings, the EAT upheld the Tribunal's decision to admit the evidence as it was always intended that there would be at least one written record of the open hearings in the minutes drawn up by the clerk of the school.

In relation to the private deliberations, the EAT held that Dogherty could not adduce such evidence in support of her claim. The EAT took into account the fact that the panel members had invited all parties and witnesses before them to withdraw so that they might deliberate privately and Dogherty and her representative accepted that invitation. Likewise, those participating in the deliberations would have done so on the premise that no one would then disclose or publish what had occurred during the private deliberations.

However, the private deliberations might become admissible where, for example, the decision

was taken by a panel which gave no reasons for its decision, and the inadvertent recording of private deliberations had produced evidence of some sort of discrimination (see BNP Paribas v Mezzotero [2004] IRLR 508).

Conclusion

Although this factual scenario is new, the decision in this case is in fact not new law. It is based on established principles of the probity and cogency of evidence in the fair resolution of disputes where evidence is available. However, it is a salutary reminder to employers to conduct hearings fairly. It may also be a warning to them to consider including the prohibition of use of covert recording in contracts of employment and employment handbooks.

Ian Mann - Employment Barrister
http://www.employment-barrister-uk.com
http://www.13kbw.co.uk
13 King’s Bench Walk
Ian Mann was called to the Bar in 2000. He practices in employment disputes representing both employers and employees. His employment practice embraces the full spectrum of Employment Tribunal, High Court and appellate work and covers all areas of employment law, especially discrimination.